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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

DR. T. BRUCE VEST,
VEST MEDICAL CONSULTANTS, LTD.,
VEST MEDICAL CONSULTANTS, LTD. PLAN NO. 001, and
VEST MEDICAL CONSULTANTS, LTD. PLAN NO. 002,
Petitioners and Cross-Respondents,

vs.

DR. MAHMOUD ZIAEE and
DR. JOHN L. SHERLOCK,
Respondents and Cross-Petitioners.

BRIEF IN OPPOSITION TO THE CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Petitioners and Cross-Respondents (hereafter "Petitioners"), as above captioned, jointly submit this brief in opposition to the Cross-Petition for Writ of Certiorari filed by Respondents and Cross-Petitioners Ziaee and Sherlock (hereafter "Cross-Petitioners"). Cross-Petitioners seek review of the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered October 19, 1990, as amended on October 30, 1990, reported as *Ziaee v. Vest*, 916 F.2d 1204 (7th Cir. 1990).

STATEMENT OF THE CASE

Petitioners incorporate by reference the Statement of the Case set forth on pages 6 through 8 of their Petition. Additionally, Petitioners reserve the right to challenge allegations set forth in Cross-Petitioners' Statement of the Case (pages 5 through 8 of their Cross-Petition) in any subsequent briefs filed in this Court.

REASONS FOR DENYING THE WRIT REQUESTED IN THE CROSS-PETITION

Cross-Petitioners have raised essentially three issues that Cross-Petitioners claim warrant review. These issues are:

(1) Whether the Court of Appeals erred in reversing the District Court's award of pension benefits under Plan No. 002 by substituting its judgment for that of the District Court;

(2) Whether the District Court erred in reversing the award of prejudgment interest and attorneys' fees; and

(3) Whether the District Court erred in reversing and remanding the award of a statutory penalty for the alleged failure by Dr. Vest to produce Plan documents.

None of these three issues are worthy of review by this Court.

As for the claim of error in the Court of Appeals' reversal of the award of pension benefits, Cross-Petitioners incorrectly allege that the appellate court erred by failing to use the "clearly erroneous" standard of appellate review and by substituting its analysis of the facts for that of the District Court. To the contrary, the Court of Appeals appropriately exercised plenary review of the District Court's legal findings and reversed the District Court's award of benefits for the reason that the District Court misapplied the standard of review of the Administrator's benefit awards.

Concerning the reversal of the award of prejudgment interest, the Court of Appeals properly concluded that the District Court abused its discretion in awarding prejudgment interest on funds tendered to the Cross-Petitioners, and on funds deposited in the Court's Registry.[1] The Court of Appeals holding is not in conflict with any decision of *any* federal court cited by Cross-Petitioners, or found by Petitioners. To the contrary, the Court of Appeals decision is in harmony with several cases from a number of circuits.

Furthermore, the Court of Appeals properly reversed the award of attorneys' fees. The Court of Appeals specifically allowed for reconsideration of the award on remand to the District Court. Cross-Petitioners cite no conflict between the Court of Appeals' actions and the rulings of other courts, and no conflict was found.

Finally, the Court of Appeals properly reversed the District Court's award of over $49,000 in statutory penalties for Dr. Vest's alleged failure to produce Plan documents. The Court of Appeals correctly concluded that the District Court failed to make any specific findings of fact to justify its penalty assessment. Again, Cross-Petitioners cite no conflict between the Court of Appeals decision and that of any other Court.

In sum, the issues raised by the Cross-Petitioners do not justify review by this Court.

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[1] Of course, Petitioners submit that the Court of Appeals did not go far enough, and that it should have vacated the entire award of interest and fees, as well as the penalty assessment.

ARGUMENT

I. The Court of Appeals properly reversed the District Court's award of pension benefits under Plan No. 002.

Cross-Petitioners contend that the Court of Appeals failed to apply the "clearly erroneous" standard of appellate review in its reversal of the District Court's Plan No. 002 benefit award and instead substituted its judgment of the facts for the District Court's findings. In so arguing, Cross-Petitioners contend that the District Court's determination of benefits was a purely factual analysis that may not be disturbed by the Court of Appeals unless "clearly erroneous." Cross-Petitioners, however, misapprehend the nature of the District Court's findings concerning Plan No. 002 benefits, which were not purely factual. As a result, Cross-Petitioners incorrectly seek the imposition of the "clearly erroneous" standard of appellate review in this case.

The District Court's benefit determination was not a purely factual analysis. Rather, the District Court was first required to determine the appropriate manner of reviewing the Administrator's actions. This determination — the selection of a standard of review of the Administrator's actions — involved legal analysis, not factual analysis. Once the District Court made its legal determination of how to review the Administrator's actions, the District Court then proceeded to make its analysis of the facts surrounding the award of benefits made by the Administrator.

On appeal, the Court of Appeals was required to review the propriety of the District Court's legal determination of how it was to treat the Administrator's actions. The Court of Appeals held that the District Court reviewed the Administrator's actions in an inappropriate manner by failing to require a finding of some error in the Plan Administrator's benefit award before disregarding the Administrator's award. The Court of Appeals also concluded that the District Court's inappropriate review of the Adminis-

trator's acts led directly to the District Court's making an improper award of benefits to the Cross-Petitioners. Thus, the Court of Appeals did not merely quarrel with the District Court's "fact finding" as suggested by Cross-Petitioners. Rather, the Court of Appeals held that the very standard used by the District Court to reach its conclusions was inappropriate. In so finding, the Court of Appeals was not challenging a factual determination, but rather a legal one.

In *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984), this Court wrote:

> Rule 52(a) does not inhibit an appellate court's power to correct errors of law, including those that infect a so-called mixed finding of law and fact, or a finding of fact that is predicated on a misunderstanding of the governing rule of law.

Id. at 501. In essence, the "clearly erroneous" standard of appellate review only has application with respect to the District Court's fact findings; legal conclusions are subject to plenary review by courts of appeal. *Id.*

A District Court's interpretation of a pension plan to determine the appropriate standard of review of the Administrator's actions is a legal question. *Ulmer v. Harsco Corp.*, 884 F.2d 98, 101-102 (3rd Cir. 1989). As a result, the District Court's award of benefits, which hinged on its improper application of the standard of review, was subject to plenary review by the Court of Appeals. The "clearly erroneous" standard of appellate review has no application here.

Furthermore, recognizing that the Court of Appeals was not limited in its review, it is clear that the District Court committed legal error. The District Court misapplied the de novo standard of review in reviewing the actions of the Plan Administrator:

> Despite its name, "de novo" review does not imply that the judge throws the plan's calculations in the trash and makes its own. The Court is still "reviewing" the plan's decision, which ought to stand unless mistaken. . . .
>
> "De novo" review means without deference but does not eliminate the need to identify a flaw.

Ziaee v. *Vest*, 916 F.2d 1204, 1208. Because the District Court failed to find any error in the Administrator's action with respect to Plan No. 002, the District Court's award was erroneous.

On the other hand, even assuming the "clearly erroneous" standard of appellate review applies, the Courts of Appeals' reversal of Plan No. 002 benefits was proper. A finding is "clearly erroneous" when "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Anderson* v. *City of Bessemer City*, 470 U.S. 564, 573 (1985). A mistake was clearly committed by the District Court.

The evidence introduced at trial demonstrated that Dr. Vest, the Plan Administrator, had Plan No. 002 benefits calculated by an enrolled actuary employed by the author of the Plan's prototype. These calculations were supported at trial by written work sheets as well as by deposition testimony describing the actuary's methodology. Indeed, even Cross-Petitioners'-own "expert" witness concluded that the actuary's methodology was appropriate.

The District Court rejected the actuary's calculations. Instead, the District Court adopted the benefits reflected in a one page letter authored by a consultant to Dr. Vest. The consultant gave no testimony at trial. No evidence of his methodology was introduced at trial. There was no evidence to support the District Court's rejection of the actuary's calculations and adoption of the consultant's. Thus, the District Court's award under Plan No. 002 was clearly erroneous.

In sum, the Court of Appeals properly subjected the District Court's Plan No. 002 award to plenary review for legal error. The District Court clearly committed legal error by misapplying the de novo standard of review of the Administrator's actions. The District Court's misapplication of the standard of review, in turn, led to the improper award of benefits to the Cross-Petitioners. This improper award was correctly reversed by the Court of Appeals.

No writ should be granted based on the Cross-Petition.

II. The Court of Appeals properly vacated the award of prejudgment interest and attorneys' fees.

Cross-Petitioners contend that the Court of Appeals erred in vacating the award of prejudgment interest on certain benefits awarded to the Cross-Petitioner. It is unclear from the Cross-Petition precisely what amount of prejudgment interest Cross-Petitioners claim the Court of Appeals erroneously vacated. Indeed, it might be argued that the Court of Appeals decision is unclear as to what, if any, amounts of prejudgment interest Cross-Petitioners are entitled to under the Court's opinion.

Suffice it to say, to the extent the Court of Appeals vacated awards of prejudgment interest, it was correct in doing so. The District Court abused its discretion in awarding interest on benefits that were either in the Cross-Petitioners actual possession at all relevant times, or which were available to them at all relevant times.

Cross-Petitioners have not cited any authority for the proposition that the District Court had the power to award prejudgment interest on sums held by or made available to the Cross-Petitioners. To the contrary, applicable authority supports the conclusion that it is an abuse of discretion to award interest on sums held — actually or constructively — by the party requesting the interest. *See Blum v. William Goldman Theatres*, 174 F.2d 908, 913 (3rd

Cir. 1949); *Broward County Port Authority v. Arundel Corp*, 206 F.2d 220 (5th Cir. 1953).

The Cross-Petitioners also complain that the Court of Appeals erred in reversing the award of attorneys' fees. The Court of Appeals did so ostensibly because it vacated the District Court's judgment on a number of grounds and reversed and remanded in judgment on other grounds. Clearly, the District Court based its award of attorneys' fees on its findings on the case as a whole. Thus, to the extent the case was vacated or reversed, the factual foundation supporting the award of fees was undercut, necessitating reconsideration of the attorneys' fees issue on remand.

Cross-Petitioners have cited no authority indicating that the Court of Appeals exceeded its jurisdiction in remanding the attorneys' fees issue with the rest of the case. Clearly, equity and fairness require a reconsideration of the attorneys' fees issue in light of the reversal of the District Court's award.

In sum, the Cross-Petition raises no issues warranting review by this Court. The Cross-Petition should therefore be denied.

III. The Court of Appeals properly reversed the award of a penalty for the Administrator's alleged failure to produce Plan documents.

The Cross-Petitioners contend that the Court of Appeals erred in reversing the penalty assessment against Dr. Vest, the Plan Administrator, for his alleged failure to produce Plan documents. The Court of Appeals held that the findings of fact issued by the District Court did not specify which documents were withheld, and for what period of time. 916 F.2d at 1210. The Cross-Petitioners submit that the District Court did make sufficiently detailed findings to support its ruling. The Cross-Petitioners are simply incorrect.

The District Court held that the Plan Administrator "was delinquent in responding to the various documents demanded by [Cross-Petitioners] a total of 9, 824 document days." Petition at A-7. However, the District Court did not specify which documents the Administrator allegedly failed to produce. Cross-Petitioners assert that "[a]t least one plan document [was not] produced from December 17, 1985 until February 15, 1989, a period of 1126 days." Cross-Petition at 12. Here again, the Cross-Petitioners failed to say *what* document was not produced for 1,126 days.

ERISA only requires that certain plan documents be produced, and further limits the number of times such documents may be requested and the number of times per year the documents must be produced. Unless the District Court specifies in detail which documents were not produced and for how long, the Administrator is helpless to respond to the allegations and to defend himself on appeal.

In sum, the Court of Appeals was correct in reversing the District Court's penalty award. While Petitioners contend that the Court of Appeals did not go far enough in its reversal (and should have vacated the penalty in its entirety), the Court of Appeals was correct, at the least, in requiring the District Court to account for its award with detailed findings subject to review on appeal.

CONCLUSION

For the reasons set forth herein, Petitioners pray that the Cross-Petition be denied in its entirety, that this Court grant Petitioners' Petition and such other and further relief as the Court deems just and proper.

Respectfully submitted,

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